

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

STATE OF WASHINGTON,

Plaintiff,

v.

BETSY DeVOS, in her official capacity as
Secretary of the United States Department of
Education; and the UNITED STATES
DEPARTMENT OF EDUCATION, a federal
agency,

Defendants.

NO. 2:20-cv-01119-MLP

DECLARATION OF
THOMAS J. (T.J.) KELLY IN
SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION

I, Thomas J. (T.J.) Kelly, hereby declare as follows:

1. I am over the age of 18, competent to testify as to the matters herein, and make this declaration based on my personal knowledge. I am currently employed as the Chief Financial Officer at the Office of Superintendent of Public Instruction.

2. I submit this declaration in support of the State of Washington's lawsuit against the United States Department of Education (Department) challenging the interim final rule (Interim Rule or Rule) it issued that requires Local Educational Agencies (LEAs) to use one of two formulas to allocate Elementary and Secondary School Emergency Relief (ESSER) Funds provided by the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act). I have compiled the information in the statements below through my personal knowledge or based on the documents that I have reviewed. I have familiarized myself with the information contained

1 in the CARES Act sections regarding primary and secondary education as well as with the
2 Department's interim final rule. I am also familiar with the requirements of section 1117 of the
3 Elementary and Secondary Education Act (ESEA).

4 3. I have served as the Chief Financial Officer at the Washington State Office of
5 Superintendent of Public Instruction (OSPI) since January 2019. My service with the agency
6 dates to September 2009, when I was hired as the Associate Director of the School
7 Apportionment and Financial Services (SAFS) office within OSPI. In October 2012, I was
8 elevated to the position of SAFS Director. In all, I have over ten years of experience with state
9 funding formulas and guidelines for districts regarding accounting and reporting fiscal,
10 enrollment, and employee information for school districts in our state.

11 4. As the Chief Financial Officer of OSPI, I manage the Financial Resources
12 Division, which is responsible for the distribution of funding, agency budgeting, research on
13 school funding, and collecting data on enrollment, personnel, and financial information. The
14 Division includes the following offices, whose directors report directly to the Chief Financial
15 Officer: Child Nutrition, Student Transportation, Apportionment and Financial Services, School
16 Facilities and Organization, Agency Financial Services, and Federal Fiscal Policy.

17 5. The staff in the Federal Fiscal Policy office work with other staff I oversee to
18 develop and implement OSPI's systems to provide federal program funding, including ESSER
19 Funds and Title I, Part A funding, to LEAs. This work includes providing written guidance to
20 LEAs, technical assistance, and training. Other divisions at OSPI, including the Special
21 Programs and Federal Accountability Division, provide guidance, technical assistance, and
22 training to LEAs to ensure that LEAs in Washington comply with federal program requirements.
23 I help supervise and personally participate in this work.

24 6. OSPI oversees 2,369 primary and secondary schools, serving over 1,147,000
25 students across the state. The State's public education system is comprised of 295 public school
26 districts, 14 authorized charter schools, and six state-tribal education compact schools. Of the

1 State's 2,369 primary and secondary public schools, 1,002 participate in Title I, Part A. In the
2 2019–20 academic year, OSPI served 520,475 low-income students. Each year, a small number of
3 school districts elect not to receive Title I, Part A funds even though they are eligible. These districts
4 typically have very small enrollment numbers and benefit from enhanced state funding due to their
5 low enrollment, which negates the need to accept what is deemed as a minimal amount of federal
6 Title I dollars.

7 7. The Washington State Board of Education accredits private schools to operate
8 within the state. At the time of the passage of the CARES Act during the 2019–20 school year, there
9 were 504 accredited private schools serving a total of 84,058 students.

10 8. OSPI oversees LEA compliance with Title I, Part A's equitable services
11 requirement in a variety of ways. The procedure to determine compliance begins with the
12 responsibility of private schools to submit the "Intent to Participate Form" to OSPI and school
13 districts in which the private school resides. The next step is for OSPI to review the iGrants FP 201
14 form that OSPI has developed and makes available LEAs to determine, first, whether a school
15 district has complied with the Title I, Part A consultation requirement and, second, whether the
16 district has collected the students' low-income information from the private school. This number is
17 reported in FP 201, and OSPI's calculation to determine the per pupil amount is made based upon
18 the school district's per pupil amount. The FP 201 application is approved by OSPI Title I, Part A
19 staff if the private school information is correctly reported.

20 9. OSPI's Consolidated Review Process is the formal review of districts to ensure that
21 the district has met all private school requirements. This occurs on a five-year rotation, and all
22 districts are monitored within that five-year rotation. Included in the monitoring accountability are
23 questions that specifically address private school equitable participation requirements. The
24 monitoring includes visiting participating private schools who are asked to confirm that equitable
25 services are provided by the district.
26

1 10. Both the CARES Act and the ESEA require school districts to consult with
2 private schools in determining the services to be provided for private schools. As the direct
3 grantee of the CARES Act funds and funds provided under Title I-A, OSPI ensures compliance
4 with both laws. To do so in a manner consistent with the ESEA, OSPI's two private schools
5 ombuds review complaints from private schools and make decisions. The ombuds are
6 responsible for addressing consultation requirements and work with school districts that are
7 required to consult with participating private schools. They have developed consultation tracking
8 documents that districts are required to keep for program reviews. If complaints are lodged
9 against a district for not meeting consultation requirements, they are responsible for working
10 with the private school to address all issues. The ombuds negotiate with school districts and
11 private schools to ensure that private school students and educators receive the ESSA services
12 that they are entitled to receive. These complaints cover the amount of funds dedicated to
13 services for private schools, the consultation process, and the services provided.

14 11. If the complainant is not satisfied with OSPI's decision, the complainant may
15 formally request a review by the Department. The decisions by OSPI can be reviewed by the
16 Department, who can ask for reimbursement of funds or terminate awards of funds. This means
17 that OSPI and school districts can lose funds for failing to comply with Department
18 interpretations.

19 12. In March 2020, Congress passed the CARES Act, which provided funding to the
20 States to assist with the costs associated with disruptions in education due to COVID-19. Under
21 the Act, each State is required to allocate not less than 90% of those funds as subgrants to LEAs
22 (90% LEA allocation).

23 13. In Washington State, school districts are LEAs for purposes of the CARES Act
24 and the Elementary and Secondary Education Act of 1965.

25 14. The CARES Act requires LEAs to provide equitable services "in the same
26 manner as provided under section 1117 of the ESEA of 1965 to students and teachers in

1 non-public schools.” Section 18003(d) of the CARES Act enumerates eligible uses of the funds
2 provided to LEAs. The remaining 10% (10% SEA allocation) will be distributed by OSPI, which
3 is subject to the CARES Act requirements in distributing its funds.

4 15. OSPI was relieved when Congress allocated money to states and local education
5 agencies to support students, families, and teachers impacted by COVID-19 and the related
6 disruptions. The disruption of primary and secondary education services has left many of
7 Washington State’s most vulnerable students without access to services provided by public
8 educational institutions, including daily meal programs, educational technology, internet access,
9 supplemental after-school programs, mental health services, and countless other services and
10 activities that schools, students, and families rely on to support student learning. The impact is
11 particularly felt by primary and secondary school students from low-income families who often
12 rely on services offered by the public education system. For example, as many as 45% of
13 Washington’s students qualify for free or reduced-price meals.

14 16. Many of our constituents are facing added challenges related to remote learning.
15 Parents and families have expressed difficulty with the responsibility of supporting the
16 educational activities of their children while managing their own jobs during the pandemic.
17 Teachers have also reported pedagogical challenges associated with remote learning for all
18 students. These challenges can be particularly acute for students who need additional supports
19 because of a physical disability or a significant learning disability, English Learners who do not
20 have the language skills to learn content areas in English, migratory students who do not have
21 access to electronic devices for on-line learning, and low-income students who do not have
22 computer or broadband access to participate in on-line learning.

23 17. The cost of providing core services to our students, families, and teachers has
24 increased because of the COVID-19 pandemic. These include increased costs for school
25 districts’ food service employees and custodial staff preparing free and reduced-price meals for
26 students; costs for childcare providers who interact with students or parents and are entitled to

1 hazard pay; food and technology expenses; and new expenses, including personal protective
 2 equipment (PPE) and sanitation devices and supplies, that now must be factored into school
 3 budgets. In addition, reducing barriers to effective student remote learning include connectivity
 4 costs for on-line learning for students who do not having computers or other electronic devices
 5 to access on-line learning.

6 18. After OSPI became aware of passage of the CARES Act and its allocation of
 7 funds to elementary and secondary schools, OSPI immediately began working on the application
 8 for those funds. The agency submitted its application on April 27, 2020. As part of the
 9 application process, OSPI had to certify that OSPI and its subgrantees would comply with state
 10 and federal laws, as follows:

11 PROGRAMMATIC, FISCAL, AND REPORTING ASSURANCES The [Chief
 12 State School Officer or his/her authorized representative] assures the following:

13 1. The [State Education Agency (SEA)] will allocate no less than 90 percent of
 14 the grant funds under this program to local educational agencies (LEAs)
 15 (including charter schools that are LEAs) in the State. Under the ESSER Fund,
 16 the SEA will award grants by formula to State educational agencies (SEAs) for
 17 the purpose of providing LEAs, including charter schools that are LEAs, with
 18 emergency relief funds to address the impact that the Novel Coronavirus Disease
 19 2019 (COVID-19) has had, and continues to have, on elementary and secondary
 schools across the Nation. This includes both continuing to provide educational
 services, such as remote learning, while schools and campuses are closed, and
 developing and implementing plans for the return to normal operations. The SEA
 will allocate these funds to LEAs on the basis of their respective shares of funds
 received under title I, part A of the Elementary and Secondary Education Act of
 1965 in fiscal year 2019.

20 2. The SEA will use the remaining funds (hereafter SEA reserve) for emergency
 21 needs as determined by the SEA to address issues related to COVID-19, which
 22 may be addressed through the use of grants or contracts. From an SEA's reserve,
 the SEA may use not more than 1/2 of 1 percent of the SEA's total grant for
 administrative costs.

23 ...

24 4. The SEA will ensure that LEAs receiving ESSER funds will provide equitable
 25 services to students and teachers in non-public schools as required under 18005
 of Division B of the CARES Act.

26 5. The SEA will ensure that an LEA receiving ESSER funds will provide
 equitable services to students and teachers in non-public schools located within

1 the LEA in the same manner as provided under section 1117 of the ESEA, as
2 determined through timely and meaningful consultation with representatives of
3 non-public schools. The SEA will ensure that a public agency will maintain
4 control of funds for the services and assistance provided to a non-public school
5 under the ESSER Fund. The SEA will ensure that a public agency will have title
6 to materials, equipment, and property purchased with ESSER funds. The SEA
7 will ensure that services to a non-public school with ESSER funds will be
8 provided by a public agency directly, or through contract with, another public or
9 private entity.

10 19. The Department granted OSPI's application on April 29, 2020, awarding
11 \$216,892,447 million. As noted above, OSPI is responsible for disbursing the 90% allocation to
12 LEAs as subgrantees. Because the LEAs are subgrantees, OSPI is obligated to ensure that the
13 LEAs conform with state and federal laws. This includes compliance with Department rules.
14 Also consistent with the CARES Act, OSPI has the responsibility to distribute the remaining
15 10% allocation. As a result, those funds are subject to compliance with state and federal laws,
16 including the Interim Rule.

17 20. Because the Legislature has not yet explicitly appropriated the ESSER Funds to
18 OSPI, the Washington State Office of Financial Management in the Governor's Office (OFM)
19 reviewed OSPI's request for authority to spend federal dollars through a process called
20 unanticipated receipts approval. On June 15, 2020, OFM granted OSPI authority to spend 80%
21 of the 90% LEA allocation, and a small portion of the 10% SEA allocation provided directly to
22 school districts. On July 16, 2020, OFM approved the remaining portion of the 90% LEA
23 allocation for distribution.

24 21. For the 90% LEA allocation, the CARES Act gives Washington school districts
25 the discretion to spend funds consistent with the CARES Act. Prior to being approved to access
26 these funds, LEAs must fill out a budget for expenditure of funds, which serves as evidence that
the expenditures align with federal law. LEAs must then submit monthly claims to receive
payment of the funds through OSPI's regular monthly process for apportioning state and federal
dollars to LEAs. An LEA's request for ESSER Fund grant payments made by the 15th of each

1 month will be paid by OSPI as a part of the LEA's apportionment payment at the end of that
 2 month.

3 22. The CARES Act provides that school districts and OSPI must use the ESSER
 4 Funds for purposes of preventing further spread of, responding to, and recovering from the
 5 effects of COVID-19. This includes providing the following services:

6 a. Providing online support and a technology helpline for students as they
 7 learn to use new technology for distance learning;

8 b. Hiring new staff to lead and support the transition to distance learning;

9 c. Providing childcare to first responders and other members of the
 10 community;

11 d. Delivering breakfast and lunch five days a week to students who qualify
 12 for free and reduced meals;

13 e. Developing trainings for students, staff and parents on how to use
 14 technology platforms and best practices for distance learning;

15 f. Providing wireless internet access to students who do not have internet
 16 connectivity at home;

17 g. Covering extra staffing costs;

18 h. Purchasing sanitizing and cleaning supplies;

19 i. Investing in new technology to enable and improve distance-learning;

20 j. Providing distance-learning related professional development services for
 21 faculty and staff;

22 k. Other expenditures as outlined in section 18003 of the CARES Act.

23 23. On April 30, 2020, the Department issued a document titled, "Providing
 24 Equitable Services to Students and Teachers in Non-Public Schools Under the CARES Act
 25 Programs" (Guidance). The Guidance states that the CARES Act's requirement that LEAs
 26 should distribute funds "in the same manner as provided under section 1117" meant that LEAs

1 should distribute funds based on the total number of enrolled students in public and private
2 schools, regardless of the income-levels of those students' families.

3 24. OSPI was concerned in reviewing the Department's interpretation, as it followed
4 neither the plain language of the CARES Act nor the usual practice for section 1117 Title I-A
5 funds. Further, in most school districts in Washington State, the percentage of students in low-
6 income families is significantly higher in public schools than in private schools. The result of
7 the Department's Guidance would have resulted in the reallocation of significant CARES Act
8 funds from low-income public-school students to higher-income private-school students. The
9 Department informed school districts that the Guidance was not legally binding so districts could
10 allocate funds consistent with the CARES Act.

11 25. Because of the confusion surrounding the Guidance, the Department's statement
12 that it was not legally binding, its clear deviation from the plain text of the CARES Act, and the
13 harmful effect it would have on Washington State public school students, OSPI initially provided
14 guidance to school districts that only private schools that had received equitable services under
15 Title I, Part A in the prior school year would be eligible to participate in equitable services under
16 ESSER. When school districts learned that the Department intended to issue a rule mandating
17 that all private schools—and all their students—must be counted in the CARES Act equitable
18 services calculation, districts reported to OSPI that this would significantly decrease the funding
19 they expected to receive for COVID-related expenses.

20 26. On June 25, 2020, the Department released the Interim Rule. The Rule was
21 published in the Federal Register and became effective on July 1, 2020. The Rule requires LEAs
22 to use one of two formulas to allocate ESSER Funds between public and private institutions.
23 OSPI is also subject to the CARES Act requirements in distributing its funds. The first
24 formula—the “enrollment-based formula”—requires districts to calculate the proportional share
25 for private schools by comparing the total enrollment of participating private schools to the total
26 enrollment in both public and private schools. The second formula—the “poverty-based

1 formula”—permits LEAs to use the formula provided in section 1117(a)(4)(A), but requires the
 2 schools to only administer the funds to students participating under Title I, Part A of the ESEA.

3 27. However, these formulas are inconsistent with the mandate of the CARES Act
 4 and the formula OSPI typically uses under section 1117(a)(4)(A).

5 28. Both available formulas under the Interim Rule impair OSPI’s ability to allocate
 6 ESSER Funds to students, teachers, and families in Washington who are most in need of
 7 additional support. The true impact of the proposed rules as compared to those identified under
 8 section 1117(a)(4)(A) of the CARES Act cannot be specifically identified due to lack of private
 9 school enrollment data reported to the SEA. Private schools are only required to report free and
 10 reduced priced eligible enrollment to OSPI, not total enrollment. OSPI has used the best
 11 information available to reasonably project or identify the general trends of funding distribution
 12 between public and private schools in the two scenarios. We acknowledge that specific impacts
 13 are not identifiable given the information available to us. OSPI believes that the estimates shown
 14 represent the minimal impact to public schools in the state when comparing the two equitable
 15 share methodologies.

16 a. If the Department’s poverty-based formula is used, it would necessarily
 17 deny CARES Act ESSER Funds to all schools that did not participate in Title I programs
 18 for the previous year. According to OSPI data, 1,367 schools did not participate in Title
 19 I, Part A during the 201-20 school year. School districts that elect to use the poverty-
 20 based formula will not be able to expend ESSER Funds to support students and staff in
 21 those 1,367 schools—including students in poverty who attend these schools. In addition,
 22 14 small school districts and two other state-recognized schools did not designate any of
 23 their schools as Title I, Part A schools—either because none of the districts’ schools were
 24 eligible, or because, for the reasons identified above, the district elected to forego the
 25 Title I dollars. Approximately 480 students are enrolled in those districts. None of them
 26

1 would be eligible to receive support under the CARES Act using the poverty-based
2 formula.

3 b. If the Department's enrollment-based formula is used, OSPI estimated
4 that private schools statewide would receive at least 4.5% of the Washington's ESSER
5 Funds allocation. This is approximately \$5 million more (at minimum) than the amount
6 we estimate the private schools would otherwise be eligible to receive under the CARES
7 Act statutory formula. We base this calculation on the most up-to-date private school
8 enrollment numbers we have. There is no uniform count of students and some schools
9 typically underreport their student enrollments. We expect that the true enrollment count
10 is much higher than this. Regardless, any diminishment in the ESSER Funds that go to
11 our public schools—let alone \$5 million—will reduce the services that the State is able
12 to provide to our students, families, and teachers who are most in need of relief from
13 expenses related to the COVID-19 pandemic.

14 29. In addition, section 76.665(c)(3) of the Interim Rule appears to require that school
15 districts using the poverty-based formula in its Title I schools are subject to the supplement not
16 supplant rule. Supplement not supplant is a federal statutory provision requiring that federal
17 grant funds must add to (supplement) and not replace (supplant) other state or local funds when
18 providing general educational services for Title I schools. Although it is not clear from the
19 Interim Rule how this will affect ESSER Funds, school districts that use the poverty-based
20 formula may be precluded from using the Funds to pay for many of the otherwise allowable
21 services under the CARES Act. For reasons that are not articulated in the Final Rule, school
22 districts that use the enrollment-based formula do not appear to be subject to the supplement not
23 supplant rule, which means they would have fewer limits on how they can elect to expend their
24 subgrant dollars. OSPI anticipates that we will need to commit agency staff time to provide
25 technical assistance and guidance to school districts regarding the supplement and supplant
26 question. This will divert our staff from otherwise providing technical assistance and guidance

1 to school districts regarding the allowable uses of ESSER Funds and how districts can claim
2 reimbursement for those expenditures.

3 30. The Rule also provides that expenditures cannot be provided until after school
4 districts or OSPI have consulted with private schools and made their choice as to which formula
5 to use. In some cases, we anticipate this process of consultation will take months because some
6 private schools either do not respond to requests for consultation or provide delayed responses.
7 We expect this will be particularly so for private schools that have not previously participated in
8 equitable services consultations under Title I, Part A. This means that districts and schools might
9 not have access to ESSER Funds until months from now.

10 31. Upon issuance of the Rule, OSPI has been reviewing and preparing materials for
11 school districts to ensure compliance. As noted above, the system through which districts claim
12 funds was released on July 16 and is structured on the original plain language of the CARES
13 Act, not the Final Rule. OSPI has advised districts that the structure of the claiming system does
14 not meet the requirements of the Rule.

15 32. Since OSPI has discretion to allocate 10% of the funds, OSPI is subject to
16 compliance with the Rule with respect to those funds. Currently, OSPI intends to utilize the 10%
17 SEA allocations on priorities such as providing no-cost internet connectivity to high poverty
18 students and families, professional development for educators on instructional delivery through
19 an on-line modality, and funding for community-based organizations that focus on providing
20 childcare opportunities.

21 33. Any diminishment in funds harms OSPI's ability to accomplish its mission to
22 transform K-12 education into a system that is centered on closing opportunity gaps and is
23 characterized by high expectations for all students and educators. OSPI seeks to achieve this
24 mission by developing equity-based policies and supports that empower educators, families, and
25 communities. The Interim Rule diverts much needed funds from the public K-12 system in ways
26 that could have greater impact of those students currently at risk of falling further behind. The

1 State intends to makes specific targeted investments in services that will create engagement with
2 and accountability for all students and staff which will mitigate risks of widening the
3 achievement gap during this pandemic. The Interim Rule harms that effort.

4 34. Public schools already face significant budgetary constraints. School districts are
5 currently planning for multiple educational delivery models in the 2020-21 school year that
6 balance the need to protect the health of students and staff in the State while providing all
7 students with educational opportunity and access to necessary services. Not knowing how
8 students and families will chose to engage in education or how that will change based on fast-
9 changing public health requirements are unprecedented challenges for OSPI and our K-12
10 system. The Department's restrictions come at a time when resource-strapped institutions are
11 scrambling to prepare for the coming school year while continuing to support needy students
12 who are disproportionately impacted by the disruptions caused by COVID-19.

13 35. In addition, as a direct grantee of the Department, OSPI has exclusive control of
14 10% SEA allocation and is tasked with and liable for ensuring LEAs' compliance in the expenditure
15 of ESSER funds. As noted above, OSPI was required to submit a Certification and Agreement
16 stating that it will comply with all federal laws and regulations. The Department may also require
17 the return with interest of any funds not distributed according to the Rule. OSPI runs the risk of
18 an enforcement action by the Department if ESSER Funds are not allocated according to one of
19 the two Interim Rule formulas. Because of significant budgetary constraints, OSPI would not be
20 able to retroactively pay private schools a greater share of the ESSER Funds than originally
21 allocated under the formula required under section 1117(a)(4)(A).

22 36. As such, OSPI faces a significantly increased administrative burden due to the
23 Rule. The burden on OSPI and the LEAs to distribute funds to public and private schools "in the
24 same manner as provided by section 1117" would have been minimal, but the Rule departs from
25 that approach and would require OSPI and LEAs to develop and implement a new set of criteria
26 for the distribution of funding. The administrative burden of adopting a new formula to allocate

1 the funds comes at a time when districts are already dealing with an unprecedented number of
2 unknown factors heading into the 2020-21 school year. The Interim Rule adds yet another
3 obstacle for school districts attempting to create an effective and equitable learning environment
4 for students during the pandemic.

5 37. The CARES Act authorizes the use of ESSER Funds to reimburse LEAs for
6 expenditures in response to COVID-19 dating back to mid-March. Given the plain language of
7 the Act, LEA's well-established practices in providing equitable services under Title I, Part A,
8 and guidance from OSPI, school districts' expenditure behavior and reaction to the pandemic
9 was likely shaped by the expectation of implementing equitable share guidelines as stated under
10 section 1117(a)(4)(A) of the ESEA. For example, school districts began purchasing PPE and
11 cleaning supplies in March to keep students and staff safe in *all* of their schools. Under the plain
12 language reading of the CARES Act, these districts should be able to claim reimbursement of
13 these allowable district-wide costs *now*. The Interim Rule, however, gives these districts two bad
14 options instead. First, they could use the poverty-based formula and seek reimbursement of these
15 costs only for their Title I schools—which means the costs the districts incurred in non-Title
16 schools could not be reimbursed with ESSER Fund dollars. Alternatively, school districts could
17 elect to use the enrollment-based formula and request reimbursement for all of the allowable
18 costs they incurred across the district since March. But this would mean the districts would have
19 to share *more* of their ESSER Fund allocation with private schools. School districts—and
20 OSPI—had no reason to believe that districts would be forced to make this intolerable choice
21 when they began purchasing critical supplies this spring.

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1 I declare under penalty of perjury under the laws of the State of Washington and the
2 United States that the foregoing is true and correct.

3 DATED this 22nd day of July 2020, at Olympia, Washington.

4
5 T. Kelly

6 THOMAS J. (T.J.) KELLY

7 Chief Financial Officer

8 Office of Superintendent of Public Instruction
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